

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Downtown Fernandina Beach Station
Fernandina Beach, FL

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Docket No. A2013-7

PUBLIC REPRESENTATIVE'S OPPOSITION TO THE
POSTAL SERVICE'S MOTION TO DISMISS

(August 15, 2013)

I. Introduction

On August 1, 2013, the Postal Service filed a motion to dismiss this proceeding, arguing that the Commission lacks subject matter jurisdiction over the appeal.¹ The Motion erroneously asserts that the Commission must dismiss the appeal because it “concerns the rearrangement of retail facilities within the Fernandina Beach community” or because the Commission’s jurisdiction does “not extend to the closing of a station or branch.” *Id.* at 1.

The Commission should deny the Postal Service’s Motion and consider the merits of the petitions for review because the Commission has subject matter jurisdiction to hear this appeal. Accordingly, Section II explains why the discontinuance of the Downtown Fernandina Beach post office is not a “closing” or “rearrangement of retail facilities” but rather a consolidation subject to the requirements of 39 U.S.C. §

¹ Motion of United States Postal Service to Dismiss Proceedings, August 1, 2013 (Motion).

404(d) under the Postal Service's own recently revised regulations. Section III explains that even if the Commission were to reject the Postal Service's revised interpretation of "consolidation," the Administrative Record raises questions of fact as to whether the former interpretation of "consolidation" applies to this discontinuance.

II. The Discontinuance of the Downtown Fernandina Beach Post Office Is a Consolidation Within the Meaning of 39 U.S.C. § 404(d).

A. Postal Service regulations classify the Downtown Fernandina Beach discontinuance as a consolidation.

According to the Postal Service's regulations, the Downtown Fernandina Beach discontinuance is a consolidation. On October 26, 2011, the Postal Service amended its discontinuance regulations. One major change was to reinterpret the meaning of "consolidation" as used by Congress in 39 U.S.C. § 404(d). Historically, the Postal Service had interpreted "consolidation" in section 404 to mean a conversion of a Post Office into a Postal Service-operated station or branch.² In 2011, the Postal Service reinterpreted "consolidation" to mean "an action that converts a Postal Service-operated retail facility into a contractor-operated retail facility." 39 C.F.R. § 241.3(a)(2)(iv).³

In justifying the reinterpretation, the Postal Service emphasized the volatility of contractor-operated retail facilities. Unlike classified stations and branches, contractor-operated retail facilities can be closed without a discontinuance process. 76 Fed. Reg. at 66185. The contract governs termination and other service changes, and the "continuation of contractor-operated facilities is much more dependent on the contractor's willingness to furnish services under contract for a reasonable fee." *Id.* Therefore, the Postal Service emphasized "it is more important that customers and other stakeholders have an opportunity to provide input when a Postal Service-operated

² Post Office Organization and Administration: Establishment, Classification, and Discontinuance, 76 Fed. Reg. 66184, 66185 (October 26, 2011). That interpretation was accepted by several Federal district courts. See, e.g., *Citizens for the Hopkins Post Office v. U.S.P.S.*, 830 F. Supp. 296, 298-99 (D. S.C. 1993); *Knapp v. U.S.P.S.*, 449 F. Supp. 158, 162 (E.D. Mich. 1978).

³ Despite the endorsement of its prior definition by various Federal district courts, the Postal Service stated its reinterpretation was justified by Supreme Court jurisprudence permitting an agency to change interpretations of ambiguous language in a statute. 76 Fed. Reg. at 66185 (citing *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 863-64 (1984)).

retail facility is converted into a contractor-operated retail facility than when a conversion results in a Postal Service-operated classified station or branch.” *Id.* Although customers “are unlikely to perceive a significant difference in service when a Post Office is converted into a Postal Service-operated classified station or branch,” “[c]ontractor-operated units may accordingly experience less predictability in their continuation.” *Id.* The Postal Service stated that the changed definition of “consolidation” was “a new interpretation of the existing statutory term” and would serve “to increase public transparency and participation.” *Id.* at 66186.

By the Postal Service’s regulations, the Downtown Fernandina Beach post office discontinuance is unquestionably a consolidation—that is, a Postal Service-operated retail facility being replaced by a contractor-operated retail facility. According to the Postal Service, the Downtown Fernandina Beach post office is a Postal Service-operated retail facility.⁴ Motion at 7. Both the Administrative Record and the Postal Service’s Notice state that the services at the Downtown Fernandina Beach post office are to be replaced with a Contract Postal Unit (CPU) at Books Plus in Fernandina Beach.⁵ Administrative Record, item 9 at 2. The Books Plus CPU is a contractor-operated retail facility as defined in 39 C.F.R. § 241.3(a)(2)(ii).⁶ Therefore, replacing the Downtown Fernandina Beach post office with a contractor-operated retail facility constitutes a consolidation under the Postal Service’s own regulations and interpretation of section 404(d). As such, the Commission should deny the Motion and consider the merits of the petitions for review.

⁴ A Postal Service-operated retail facility “includes any Postal Service employee-operated post office, station, or branch, but does not include any station, branch, community post office, or other retail facility operated by a contractor.” 39 C.F.R. § 241.3(a)(2)(i).

⁵ United States Postal Service Notice of Filing Administrative Record, August 1, 2013, at 1 (Notice). The Notice states that “[t]he Postal Service is today filing the electronic version of the administrative record concerning the Final Determination to Close the Fernandina Beach Downtown Station and Continue to Provide Service By Contract Postal Unit.” *Id.* The partial administrative record is attached to the Notice (Administrative Record). A second portion of the Administrative Record was filed on August 9, 2013. See United States Postal Service Notice of Filing of Supplemental Documents for Inclusion in the Administrative Record, August 9, 2013 (Administrative Record Supplement). A third portion of the Administrative Record was filed on August 14, 2013. See United States Postal Service Second Notice of Filing of Supplemental Documents for Inclusion in the Administrative Record, August 14, 2013.

⁶ A contractor-operated retail facility “includes any station, branch, community post office, or other facility, including a private business, offering retail postal services that is operated by a contractor, and does not include any USPS-operated retail facility.” 39 C.F.R. § 241.3(a)(2)(ii).

B. The Postal Service is bound by its regulations.

The Postal Service is bound by the discontinuance regulations it promulgated in 2011. One of the most firmly established principles in administrative law is that agencies are bound by their own rules.⁷ The Supreme Court has repeatedly held that federal agencies cannot act contrary to their existing valid regulations.⁸ In *American Farm Lines*, the Supreme Court narrowed its prior holdings by distinguishing between “procedural rules adopted for the orderly transaction of business” and rules that “confer important procedural benefits upon individuals.”⁹ Courts have consistently remanded agency decisions when the agency acted in violation of its own regulations, particularly in those cases where an agency’s failure to follow its regulations denied individuals of procedural rights or caused them substantial prejudice.¹⁰ As the D.C. Circuit has emphasized:

[I]t is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned, for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules

Reuters, Ltd., 781 F.2d at 950-51 (internal citations omitted).

In light of this jurisprudence, there is no question that the Postal Service is bound by its regulations in 39 C.F.R. § 241. In particular, when the Postal Service reinterpreted “consolidation,” it emphasized that the change would serve “to increase public transparency and participation.” 76 Fed. Reg. at 66186. Yet, in this proceeding, the Postal Service seeks to deny the postal patrons of Downtown Fernandina Beach the additional protections that were conferred when the Postal Service amended 39 C.F.R.

⁷ Charles Alan Wright and Charles H. Koch, Jr., *Federal Practice and Procedure: Judicial Review of Administrative Action* § 8165 (2006); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, 947 (D.C. Cir. 1986) (stating “[a] precept which lies at the foundation of the modern administrative state is that agencies must abide by their rules and regulations.”).

⁸ *Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959); *Service v. Dulles*, 354 U.S. 363, 388-89 (1957); *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954).

⁹ *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-39 (1970).

¹⁰ See e.g., *Leslie v. Attorney Gen. of the United States*, 611 F.3d 171, 182-83 (3d Cir. 2010); *U.S. v. UPS Customhouse Brokerage, Inc.*, 575 F.3d 1376, 1383 (Fed. Cir. 2009); *Picca v. Mukasey*, 512 F.3d 75, 79-80 (2d Cir. 2008).

§ 241.3 and reinterpreted Congress’s use of the word “consolidation.” Instead, the Postal Service now argues that the petitioners should be denied their statutory right to appeal consolidations—a sharp departure from the Postal Service’s initial goal of increasing public transparency and participation in cases where a Postal Service-operated retail facility is being replaced by a contractor-operated retail facility. The Commission should reject the Postal Service’s arguments in the Motion and find that that the law requires the Postal Service to follow its regulations.

C. The Postal Service’s arguments in the Motion cannot be reconciled with the Postal Service’s regulations.

The Postal Service’s assertion that the Commission lacks subject matter jurisdiction over this proceeding cannot be reconciled with current Postal Service regulations. In the Motion, the Postal Service argues against its own interpretation of “consolidation” when stating that the discontinuance of the Downtown Fernandina Beach post office is a “rearrangement of retail facilities within the Fernandina Beach community” and therefore outside the purview of section 404(d). Motion at 1. First, as already discussed, this argument directly contradicts the Postal Service’s regulations and is therefore impermissible, as the Postal Service is bound by its regulations.¹¹

Second, the Commission precedent that the Postal Service cites in support of its assertion that the Downtown Fernandina Beach consolidation is a “rearrangement” rather than a closure or consolidation is inapplicable to facts of this proceeding. In each of those cases—Oceana Station¹², Steamboat Springs¹³, East Elko Station¹⁴, and Pimmit Branch¹⁵—the services from the closed post office were replaced with another Postal Service-operated facility. None of those cases involved the facts at issue in this

¹¹ See *supra* Section II.B.

¹² Docket No. A82-10, Order Dismissing Docket No. A82-10, June 25, 1982 (Order No. 436).

¹³ Docket No. A2010-2, Order Dismissing Appeal, April 27, 2010 (Order No. 448).

¹⁴ Docket No. A2010-3, Order Dismissing Appeal, June 22, 2010 (Order No. 477).

¹⁵ Docket No. A2011-90, Order Dismissing Appeal, January 20, 2012 (Order No. 1159).

proceeding—a Postal Service-operated facility being replaced with a contractor-operated retail facility.¹⁶

Third, the Postal Service’s assertion that branches and stations are outside the scope of section 404(d) borders on frivolous in light of its regulations and Commission precedent. The Postal Service is bound by its regulations,¹⁷ and those regulations state that consolidations under section 404(d) only occur to retail facilities classified as stations or branches.¹⁸ Yet, in the Motion, the Postal Service states that branches and stations are categorically excluded from the Commission’s jurisdiction under section 404—an argument that has been repeatedly rejected by the Commission.¹⁹ Motion at 7. In light of these irreconcilable positions and the prevailing regulatory language, the Commission should reject the Postal Service’s assertion that the Commission lacks subject matter jurisdiction over the Downtown Fernandina Beach consolidation.

D. The policy rationale the Postal Service used to reinterpret “consolidation” is relevant to the Downtown Fernandina Beach consolidation.

The Postal Service’s justification for reinterpreting “consolidation” is applicable to the facts of this proceeding. The Postal Service emphasized that its rationale for reinterpreting the meaning of “consolidation” in section 404(d) was to protect postal

¹⁶ See Order No. 436 at 4-5; Order No. 448 at 5; Order No. 477 at 7-8; Order No. 1159 at 11-12. In addition, all but Pimmit Branch were decided prior to the Postal Service’s rule change.

¹⁷ See *supra* Section II.B.

¹⁸ In a different 2011 rulemaking in which the Postal Service deferred determination on a reinterpretation of “consolidation,” the Postal Service stated that “the Postal Service does not believe that the authority exists to extend the Commission’s grant of jurisdiction in 39 U.S.C. 404(d)(5) to the closure or consolidation of a station or branch. This is true regardless of how ‘consolidation’ is interpreted.” Post Office Organization and Administration: Establishment, Classification, and Discontinuance, 76 Fed. Reg. 41413, 41414 (July 14, 2011). If the Postal Service’s statements were true, then that would mean Congress intended to import a different meaning to the phrase “to close or consolidate a post office” in section 404(d)(2), (d)(3), and (d)(4) than it did in section 404(d)(5). Such a reading defies logic, the context of the phrase in section 404(d), and the “natural presumption that identical words used in different parts of the same act are intended to have the same meaning.” See *Atl. Cleaners & Dyers v. U.S.*, 286 U.S. 427, 433 (1932); *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574-76 (2007) (stating that there is a presumption that the same term has the same meaning in a single statute, but context must be considered as well).

¹⁹ This assertion has been rejected in multiple Commission decisions. See Docket No. A2006-1, Order No. 1480, Order Denying Postal Service Motion to Dismiss and Remanding for Further Consideration, September 29, 2006, at 5-12; Docket No. N2009-1, Advisory Opinion Concerning the Process for Evaluating Closing Stations and Branches, March 10, 2010, at 13.

patrons from the unpredictable nature of contractor-operated retail facilities. 76 Fed. Reg. at 66185. Since contractor-operated retail facilities could close suddenly and without a discontinuance process, the Postal Service stated that it is was important to give postal patrons whose branch or station was being replaced by a contractor-operated retail facility the opportunity to provide input. *Id.* The Postal Service emphasized that redefining “consolidation” fit “into the larger framework of changes to orient discontinuance processes more appropriately around customer expectations—as the Commission and others have recommended for years—and to increase public transparency and participation.” *Id.* at 66186.

The Postal Service’s policy rationale and legal justification for redefining “consolidation” correspond with the situation in Downtown Fernandina Beach. The Downtown Fernandina Beach post office is currently classified by the Postal Service as a station.²⁰ In proposing to replace services with the Books Plus CPU, the Downtown Fernandina Beach postal patrons are left vulnerable. Should the Books Plus CPU end postal services next year, or even next month, postal patrons will have no recourse. Since the CPU is a contractual arrangement between Books Plus and the Postal Service, postal patrons have no input in the length of the contract, its terms, or its conclusion. They have no control over quality or limitations on services provided by the CPU.

The Postal Service reinterpreted the meaning of “consolidation” in section 404(d) because changes like these have significant effects on postal patrons and their access to services. 76 Fed. Reg. at 66185. The Postal Service believed the reinterpretation would give postal patrons new input and recourse when a community stood to lose its Postal Service-operated retail facility, as is occurring in Downtown Fernandina Beach. *Id.* at 66186. However, rather than admitting that its regulations require an assessment of the appeal on the merits, the Postal Service now argues the Commission should take rights away from postal patrons—rights the Postal Service argued were important enough to warrant a reinterpretation of Congress’s words through revised regulations just

²⁰ Motion at 7. *But see* Administrative Record, items 10, 14, 15 (referring to the Fernandina Beach Downtown Post Office) and discussion in Section III, *infra* (discussing how a postmaster position will be eliminated).

two years ago. Accordingly, the Commission should reject the Postal Service's arguments and consider the merits of this proceeding.

III. The Downtown Fernandina Beach Post Office Consolidation Also Falls Under The Former Interpretation of The Term "Consolidation."

The Administrative Record raises a question of fact as to whether the discontinuance of the Downtown Fernandina Beach post office is also a consolidation under the former interpretation of "consolidation." Over 25 years ago, the Commission found that a consolidation involved changing a post office into a branch or station, resulting in a change in management structure which includes the elimination of the postmaster position.²¹ At the time, that was the Postal Service's definition in its regulations and had been accepted as a reasonable interpretation by the Federal district courts.²² It does not appear that the Commission has addressed the definition of "consolidation" in its more recent cases.²³

The Administrative Record states that the discontinuance of the Downtown Fernandina Beach post office will result in the elimination of a postmaster position and thus would also be a consolidation under the previous interpretation of Congress's language. The Administrative Record contains two date stamped documents entitled "Proposal to Close the Fernandina Beach Downtown, FL Station and Continue to Provide Service by Contract Postal Unit."²⁴ The date stamps on the two proposals

²¹ Docket No. A86-13, Order No. 696, Order Dismissing Docket No. A86-13, June 10, 1986, at 2, n.1.

²² See *supra* note 2, note 3 & accompanying text.

²³ The most recent discussion occurred in Docket No. A2003-1, where the Commission reiterated the definition discussed by a Federal district court in *Knapp v. U.S.P.S.* In that case, consolidation was found to have "the characteristic of subordinating the day to day overall management of one office having a postmaster to the administrative personnel of another office." Docket No. A2003-1, Order No.1387, Order Dismissing Appeal on Jurisdictional Grounds, December 3, 2003, at 4 (citing *Knapp v. U.S.P.S.*, 449 F. Supp. 158, 162 (E.D. Mich. 1978)). The Postal Service emphasized its right under *Chevron* to change its interpretation in its 2011 rulemaking despite lower courts' findings that its previous interpretation was valid. 76 Fed. Reg. at 66185. The *Knapp* decision was issued prior to *Chevron* and its progeny.

²⁴ Since both proposals are labeled as "item 17," the Public Representative will cite to the page number of the Administrative Record (page number in the .pdf document) rather than the item number. The first proposal follows item 16, while the second follows item 23. Administrative Record at 31-35, 596-97.

contain identical date of posting and date of removal stamps from Fernandina Beach, USPS 32034. See *id.*, item 16, item 23.²⁵

In the “Effect on Employees” section of the first proposal, the proposal states: “There is currently a Postmaster assigned to this unit. The Postmaster may be moved to another facility if possible. Additionally there are 48 craft employees assigned to this unit. These employees will be relocated per the National Labor Agreements.” *Id.* at 35. The “Effect on Employees” section of the second proposal states very different facts— “[c]urrently only 1 employee works at the Downtown Station. Employee would be relocated to Main Post Office approximatly [sic] 3 miles away.” *Id.* at 597.²⁶

The Administrative Record contains no explanation for the competing date stamped proposals, why the content differs in several respects,²⁷ or why the proposals were signed on the same day by different individuals.²⁸ There is also no explanation as to which proposal was posted in the Downtown Fernandina Beach post office or on which proposal comments were received.²⁹ Therefore, even if the Commission rejects the Postal Service’s reinterpretation of “consolidation,” the Commission must resolve

²⁵ The stamps for the first proposal appear on the Invitation for Comments letter to patrons, while the stamps for the second proposal appear on the cover sheet of the second proposal. *Id.*

²⁶ Two final determinations have also appeared in this proceeding. See Administrative Record Supplement, item 35; Petitioner’s Request to Affirm Appeal and Stop Closing, August 13, 2013, Attachment (Second Final Determination). Identical language concerning the number of employees appears in both versions of the final determination. Administrative Record Supplement, item 35 at 6; Second Final Determination at 6. However, the two final determinations contain different discrepancies than those between the two proposals—including a 300% difference in the 10 year economic savings. Compare Administrative Record Supplement, item 35 at 6 with Second Final Determination at 6. Since the Postal Service attributed a \$591,250 savings for EAS Craft and Labor in one of the final determinations, the Commission should explore whether such a significant savings is the result of the elimination of a postmaster position. Administrative Record Supplement, item 35 at 6.

²⁷ The second proposal also explains where replacement Post Office Box service will be available, a fact omitted from the first proposal. Administrative Record at 596. The first proposal states that there are 625 P.O. Box or general delivery customers, while the second identifies 548. *Id.* at 35, 597. The request to study for discontinuance cites 625 P.O. Box customers. *Id.*, item 1.

²⁸ The first was signed by Charlotte M. Cutlip, although the signature line reads “Keith Pierle, Manager, Post Office Operations.” *Id.* at 35 (as compared to Ms. Cutlip’s signature on item 16). The second was signed by Stephen Hardin, also “Manager, Post Office Operations.” *Id.* at 597. The Commission may also want to inquire as to why Ms. Cutlip’s signature appears where Mr. Pierle’s should.

²⁹ The Public Representative is equally concerned that the final determination filed with the Commission in the Administrative Record Supplement is different than the final determination posted at the Downtown Fernandina Beach post office. The two proposals and two final determinations (only one of which the Postal Service placed in the Administrative Record) raise significant questions about the integrity of the Administrative Record and the Postal Service’s actions in Downtown Fernandina Beach.

whether a postmaster position is being eliminated by the Downtown Fernandina Beach discontinuance.

IV. Conclusion

The Postal Service's Motion should be denied and the Commission should evaluate the petitions for review on the merits because this case involves a consolidation within the meaning of section 404(d)—both according to relevant Postal Service regulations and the prior interpretation of Congress's use of the term "consolidation." Federal agencies are bound by the regulations they promulgate. Federal agencies may not, as the Postal Service attempts to do in this case, assert arguments that ignore regulatory and statutory obligations in order to prevail in a proceeding. This is particularly true in this proceeding, where the Postal Service seeks to deny petitioners rights granted by statute by asserting arguments that contradict the Postal Service's interpretation of Congress's use of the word "consolidation" and Postal Service regulations. Therefore, the Commission should deny the Postal Service's Motion and consider the merits of the petitions for review.

Respectfully submitted,

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